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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

MISSOURI PACIFIC RAILROAD COMPANY d/b/a UNION PACIFIC RAILROAD COMPANY
a Delaware Corporation

Petitioner,

v.

JAMES M. JOHNSON and FRANCIS L. JOHNSON, as Representatives of the ESTATE OF JEREMY MICHAEL JOHNSON, Deceased,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

---

PETITION FOR WRIT OF CERTIORARI

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33pp

Does the Federal Railroad Safety Act preempt all municipal ordinances which purport to govern the speed of trains through towns and cities in the United States?

RULE 29.6 LISTING

Petitioner Missouri Pacific Railroad Company (MPRR) is a wholly owned subsidiary of Missouri Pacific Corp. (MPC). Missouri Pacific Corp.(MPC) is a wholly owned subsidiary of Union Pacific Holdings Corporation (UPHC). Union Pacific Holdings Corporation (UPHC) is a wholly owned subsidiary of Union Pacific Corporation (UPC).

Petitioner Union Pacific Railroad Company (UPRR) is a wholly owned subsidiary of Union Pacific Holdings Corporation (UPHC). Union Pacific Holdings Corporation (UPHC) is a wholly owned subsidiary of Union Pacific Corporation (UPC). There are no other wholly owned subsidiaries of Union Pacific Corporation (UPC).

Subsidiaries of Petitioner Missouri Pacific Railroad Company (MPRR) that are not wholly owned by that corporation are as follows:

Arkansas & Memphis Railway Bridge and Terminal Co.
Brownsville & Matamoros Bridge Company
Houston Belt & Terminal Railway Company
Kansas City Terminal Railway
Southern Illinois and Missouri Bridge Co.
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
The Alton & Southern Railway Company
The Belt Railway Company of Chicago
TTX Company

Wichita Union Terminal Railway Company

Subsidiaries of Petitioner Union Pacific Railroad Company (UPRR) that are not wholly owned by that corporation are as follows:

Alameda Belt Line
Automated Monitoring & Control International, Inc.
Camas Prairie Railroad Co.
Central California Traction Co.
Iowa Transfor Railway Company
Kansas City Terminal Railway Co.
Longview Switching Co.
MT Properties, Inc.
Oakland Terminal Railway
Peoria and Pekin Union Railroad Company
Portland Terminal Railway Company
Portland Traction Company
St. Joseph & Grand Island Railway Co.
St. Joseph Terminal Railroad Company
The Denver Union Terminal Railway Co.
The Ogden Union Railway & Depot Co.
Transportation Data Xchange
TTX Company

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On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

Petitioner, Missouri Pacific Railroad Company, d/b/a Union Pacific Railroad Company ("Missouri Pacific") seeks a writ of certiorari to review an order of the Supreme Court of the State of Oklahoma, which denied review of an opinion and order of the Court of Appeals of the State of Oklahoma.

OPINIONS BELOW

The October 16, 1996, unpublished order of the Supreme Court of the State of Oklahoma is reprinted at Appendix A.[1] The July 16, 1996, unpublished opinion of the Court of Appeals of the State of Oklahoma is reprinted at App. B.

JURISDICTION

The trial court entered judgment on the jury verdict on November 21, 1994. The Court of Appeals for the State of Oklahoma ("Oklahoma Court of Appeals") affirmed the trial court's judgment on July 16, 1996. App. B. The Supreme Court of the State of Oklahoma ("Oklahoma Supreme Court") issued its order denying certiorari on October 16, 1996. App. A. Justices Ralph B. Hodges, Robert E. Lavender, and Marian P. Opala voted to grant certiorari. This Petition for a Writ of Certiorari is being docketed in this Court within ninety days from the entry of the order denying discretionary review by the Oklahoma Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (1993).

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL REGULATIONS INVOLVED

*The United States Constitution states in Article VI, Clause 2:

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[1]References to documents reprinted in an Appendix will hereinafter appear in the Petition as "App."

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land;

*Section 101 of the Federal Railroad Safety Act, formerly at 45 U.S.C. § 421 and now at 49 U.S.C. § 20101, provides as amended:

> The purpose of this chapter is to promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents.

*Section 205 of the Federal Railroad Safety Act, formerly at 45 U.S.C. § 434 and now at 49 U.S.C. § 20106, provides as amended:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law regulation, or order-
>
> > (1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

*Section 205 of the Federal Railroad Safety Act, formerly at 45 U.S.C. § 434 provided as follows:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

*Section 213.9(a) of the Code of Federal Regulations provides as follows:

(a) Except as provided in paragraphs (b) and (c) of this section and §§ 213.57(b), 213.59(a), 213.113(a), and 213.137(b) and (c), the following maximum allowable operating speeds apply:

[In miles per hour]

Over track that meets all of the requirements prescribed in this part for -	**The maximum allowable operating speed for freight trains is -**	**The maximum allowable operating speed for passenger trains is -**
Class 1 track	10	15
Class 2 track	25	30
Class 3 track	40	60
Class 4 track	60	80
Class 5 track	80	90
Class 6 track	110	110

*ORDINANCE NO. 1973-2-2: SECTION 1 OF FORT GIBSON, OKLAHOMA provides as follows:

It is unlawful for any person, firm, or corporation to operate, drive or propel, or cause to be operated, driven or propelled any railway engine for a greater speed than forty (40) miles per hour when entering an intersecting street or avenue within the incorporated

limits of the town of Fort Gibson, Muskogee County, Oklahoma.

STATEMENT OF THE CASE

This case raises an issue of federal preemption. The question presented is: does the Federal Railroad Safety Act preempt all municipal ordinances which purport to govern the speed of trains through towns and cities in the United States? That question arises on the following facts.

On January 11, 1991, at approximately 11:10 p.m., a Missouri Pacific train collided with a pick-up truck at the Walnut Street crossing in Fort Gibson, Oklahoma. The truck was loaded with five teen-agers who were crammed in the front cab and three teen-agers in the covered pick-up bed. Jeremy Johnson, the driver, and five of the passengers were killed.

The testimony of two witnesses indicated that Jeremy Johnson had driven up to a crossing where the lights were flashing and the gates were coming down, turned on a parallel road and accelerated at a high rate of speed toward the Walnut Street crossing in an obvious attempt to beat the train. The two surviving passengers denied this version of the accident. The Fort Gibson teen-agers were familiar with the characteristics of this railroad crossing. Walnut Street crossing is protected by standard crossbucks, advanced warning signs and pavement markings.

Prior to this accident, there had been only one previous automobile/train accident in the city's history. It happened at the

Walnut Street crossing in 1972, almost 20 years earlier. In 1973 (allegedly as a result of the 1972 automobile/train accident), ***Fort Gibson passed a city ordinance restricting train speed through town to 40 mph.***

At the time of the Johnson accident, the railroad tracks in Fort Gibson had a Class IV Federal Railroad Administration (FRA) classification. ***Under FRA rules***, promulgated pursuant to the Federal Railroad Safety Act of 1970 (the FRSA), formerly 45 U.S.C. §§ 421-447 (1986), now recodified at 49 U.S.C. §§ 20101-26102 (1994), ***the maximum speed for freight trains on Class IV track is 60 mph***. 49 C.F.R. § 213.9. The Missouri Pacific train was traveling at 48-50 mph at the time of the collision.

Jeremy Johnson's parents brought a wrongful death lawsuit, suing Missouri Pacific and the train's engineer. In June of 1993, Missouri Pacific filed its motion for partial summary judgment on several issues including the issue present before this Court.[2] Missouri Pacific argued that train speed is regulated pursuant to the Federal Railroad Safety Act, therefore, local or municipal train speed regulations are preempted by the federal speed regulations. On July 1, 1993, after oral arguments on Missouri Pacific's motion for partial summary judgment regarding federal preemption, the trial court denied the motion.[3] On August 17, 1993, Missouri Pacific filed its

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[2]Missouri Pacific's motion for partial summary judgment is designated as Index No. 94, pp. 504-565, to the Record on Appeal filed with the Oklahoma Court of Appeals.

[3]The order denying the motion for summary judgment was filed with the trial court on July 29, 1993. The order is designated as Index No. 148, pp. 1081-1082.

motion in limine regarding local ordinances pertaining to train speed, and its motion in limine regarding the allegedly excessive train speed or the alleged duty of the railroad to reduce train speed for this crossing. Both of these motions asserted federal preemption and the Federal Railroad Safety Act.[4] On September 12, 1994, immediately prior to voir dire, the motions were denied by the trial court in open court.[5]

The trial court allowed the Respondents to introduce a copy of the city ordinance into evidence, over the railroad's objection, and to build most of their case around the theory that "six young people died as a result of a train speeding through the town of Fort Gibson in violation of the law...". The theory that the train was not merely speeding, but *wantonly* speeding, *permeated* the trial.

The jury found *no* liability on the part of the engineer, and found Jeremy Johnson to have been *equally at fault* with Missouri Pacific. The jury returned a verdict against Missouri Pacific for $1 million in actual damages and $3 million in punitive damages. Judgment on the jury verdict was entered on November 21, 1994.[6]

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[4]The motions in limine are, respectively, designated as Index No. 187, pp. 1343-1366, and Index No. 189, pp. 1388-1409, to the Record on Appeal filed with the Oklahoma Court of Appeals.

[5]The trial court's oral denial of the motions regarding federal preemption can be found at Transcript, Volume I, pp. 89-91. Hereinafter, all references to the transcript will be denoted by volume and page number only. For example: v. I, p. 1.

[6]The judgment is designated as Index No. 331, pp. 3401-3405 to the Record on Appeal to the Oklahoma Court of Appeals.

Missouri Pacific appealed to the Oklahoma Supreme Court, requesting that court to vacate the trial court's judgment and remand this action for further proceedings consistent with Oklahoma and federal law. On August 30, 1995, Missouri Pacific filed its Brief in Chief with the Supreme Court of the State of Oklahoma, raising and arguing the federal question of preemption in the following propositions:

I. The Trial Court Erred In Allowing The Jury To Consider Train Speed Issues, Which Are Preempted By Federal Law.

   A. Train speed issues are preempted by federal law.

   B. The State of Oklahoma has not adopted a more stringent law, regulation or order regarding train speed.

   C. The trial court erroneously submitted Jury Instructions 24 (negligence *per se*), 25 and 26 regarding the municipal train speed ordinance over defense counsel' objections. Apps. C, D, and E, respectively.

II. The Trial Court Erred In Admitting Evidence Of Circumstances Surrounding The Passage Of the Local Speed Ordinance And In Giving Jury Instruction No. 28. App. F.

   A. Even in absence of preemption, admission of such evidence was error, because

circumstances surrounding passage of the local speed ordinance were irrelevant.

B. The trial court erred in giving Jury Instruction No. 28 (regarding the city ordinance).

The appeal was subsequently assigned to the Oklahoma Court of Appeals. The Oklahoma Court of Appeals affirmed the trial court, avoiding the issue of federal preemption. App. B. Missouri Pacific raised the federal preemption issue in its Petition for Writ of Certiorari and subsequent Reply to the Oklahoma Supreme Court. Apps. G and H. The Oklahoma Supreme Court, without opinion, denied Missouri Pacific's Petition on October 16, 1996. App. A.

REASONS FOR GRANTING THE WRIT

Summary of Argument

Missouri Pacific operates interstate trains that cross Fort Gibson's streets. It is undisputed that the federal speed limit through Fort Gibson is sixty (60) miles per hour (Class IV track). The City of Fort Gibson passed an ordinance prohibiting train speeds in excess of forty (40) miles per hour. The ordinance is expressly preempted by the FRSA. Municipal regulation of train speed is also a violation of the Supremacy Clause of the United States Constitution. The Oklahoma decision creates a conflict between federal and state law, will unreasonably burden interstate commerce, and will allow the Oklahoma trial courts to ignore the Supremacy Clause and impose a myriad of municipal train speed regulations on interstate trains. The harmful impact of such an opinion requires the granting of Missouri Pacific's Petition for Writ of Certiorari.

I. THE FEDERAL RAILROAD SAFETY ACT PREEMPTS ALL CITY ORDINANCES PURPORTING TO REGULATE TRAIN SPEED.

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. The Supreme Court summarized the instances in which federal law preempts other legislation under this authority:

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. *Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law,* when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, *where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law,* or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986) (emphasis added). "The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *CSX*

Transp., Inc. v. City of Plymouth, Mich., 86 F.3d 626, 627, 628 (6th Cir. 1996) (quoting *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 369, 106 S.Ct. 1890, 1899, 90 L.Ed.2d 369 (1986)).

A. Congress Expressed A Clear Intent to Preempt State and Local Law.

In 1970, in response to concern about grade crossing safety, the United States Congress enacted the Federal Railroad Safety Act (the "FRSA"), formerly 45 U.S.C. §§ 421-447 (1986), now recodified at 49 U.S.C. §§ 20101-26102 (1994). The FRSA *EXPRESSLY* preempts state and local regulation of train speeds. The Act begins with directions to the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103 (formerly 45 U.S.C. § 431). 49 U.S.C. § 20106 (formerly 45 U.S.C. § 434), the provides, as amended, the following:

> Laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, rule, regulation, order or standard, related to railroad safety until such time as the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. 49 U.S.C. § 20106.

Whether State regulation is preempted is a question of Congressional intent, with Congressional purpose being the "ultimate touchstone" of the inquiry. *See Allis-Chalmers Corp. V. Lueck*, 471

U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). In enacting the FRSA, Congress sought to promote rail safety by establishing nationally uniform rail safety standards. In doing so, Congress "define(d) explicitly" its intent to preempt State regulation of any aspect of rail safety which the Secretary has regulated. *See Armijo v. Atchison, Topeka & Santa Fee R..R.. Co.*, 19 F.3d. 547 (10th Cir. 1994). The FRSA's preemptive effect is clearly established by the terms of the Act itself, by its purpose as expressed in legislative history, and by uniform case law interpreting its provisions.

Legislative history reveals "that the issue of federal preemption was vigorously debated, leaving a clear record of Congressional intent for virtually complete federal preemption in the area of railroad safety laws." *CSX Trans., Inc. v. Public Util. Comm'n,* 701 F.Supp. 608, 613 (S.D. Ohio 1988), *aff'd,* 901 F.2d 497 (6th Cir. 1990). As two congressmen noted, preemption was the central feature of the FRSA. Hearings before the House Subcommittee on Transportation and Aeronautics, May 17-23, 1970, U.S. Government Printing Office 43, 114 (remarks of Reps. Springer and Kuykendall). The clear and manifest purpose of Congress was to proscribe State regulation of railway safety.

Congress expressly intended that the FRSA preempt all railroad safety legislation except *state law* governing an area in which the Secretary of Transportation has not issued a regulation or order or *state law* more strict than federal regulations when necessary to address *unique* local problems. 49 U.S.C. § 20106. A *state* may adopt or continue in force an additional or more stringent law, regulation or order related to railroad safety so long as the law, regulation or order: (1) is necessary to eliminate or reduce essentially

local safety hazards; (2) is not incompatible with a law, regulation, or order of the United States government; and (3) does not unreasonably burden interstate commerce. 49 U.S.C. § 20106. These exceptions apply only to a "*State* ... law, regulation, or order ..." 49 U.S.C. § 20106 (emphasis added). Only when a state law meets all three requirements set forth in § 20106 does preemption not occur. *SeeWright v. Illinois Central R.R. Co.*, 868 F. Supp. 183 (S.D.Miss. 1994); *Smith v. Norfolk & Western Ry. Co.*, 776 F. Supp. 1335 (N.D.Ind. 1991).

Congress' intent to preempt is also strongly supported by the 1994 Congressional reenactment of the FRSA. The legislative history of the reenactment expressly states that Congress intended no substantive change in the law to result from the FRSA's reenactment. *See* H.R. No. 180, 103d Cong., 2d Sess. 1 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818. Prior to this reenactment, interpretive case law uniformly held that the FRSA did not provide for municipal regulation of train speed. *See Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir. 1973); *Landrum v. Norfolk Southern Corp.*, 836 F.Supp. 373 (S.D. Miss. 1993); *CSX Trans., Inc. v. City of Thorsby*, 741 F.Supp. 889 (N.D.Ala. 1990); *Grand Trunk Western RR. Co. v. City of Merrillville*, 738 F.Supp. 1205 (N.D.Ind. 1989); *CSX Trans., Inc. v. City of Tullahoma*, 705 F.Supp. 385 (E.D.Tenn. 1988); *and Southern Pacific Trans. Co. v. Town of Baldwin*, 685 F.Supp. 601 (W.D.La. 1987). The reenactment doctrine provides that where legislation is uniformly construed by the courts, Congress, being presumed to know interpretive case law, adopts the court's interpretation at the time of reenacting legislation without substantive change. *See Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 870, 55 L.Ed.2d 40 (1978). Under the reenactment doctrine, Congress

has signified its agreement with interpretative case law concerning this issue.

Whether the State of Oklahoma "could have" adopted a more stringent law, regulation or order is *not* an issue in this case. Oklahoma has *not* attempted to do so, and therefore, the exceptions allowed under 49 U.S.C. § 20106 need not be addressed. (The FRSA does not include ***any*** exceptions for cities or other local governments.)

B. Congress Has Covered the Subject Matter of Train Speed Regulation and, thus, State and Local Governments Can Not Supplement Federal Law.

The Supremacy Clause of Art. VII of the Constitution provides Congress with the power to preempt state law, and pursuant to the that Clause, preemption occurs "... where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law...". *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986). In § 20106 of the FRSA, Congress manifested its unwillingness to provide the States any role in regulating train speed for the reason that subjecting the railroads to enforcement from a number of state and judicial administrative systems could well result in a burden on interstate commerce. H.R. Rep. No. 1194, 91st Cong., 2d Sess. 11, 19 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109.

In *CSX Transportation v. Easterwood,* 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d. 387 (1993), this Court held that the

Secretary of Transportation's adoption of the regulations in § 20106 should be understood as covering the matter of train speed [thus precluding common law excessive speed claims]. This Court explained that:

> [R]elated safety regulations adopted by the Secretary reveal that the limits were adopted only after the hazards posed by track conditions were taken into account. *Understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation of the sort which respondent seeks to impose on petitioner.*
>
> ***
>
> Read against this background, [49 C.F.R.] Section 213.9 (a) should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings. Respondent nevertheless maintains that preemption is inappropriate because the Secretary's primary purpose in enacting the speed limits was not to ensure safety at grade crossings, but rather to prevent derailments. *Section 434 does not, however, call for an inquiry into the Secretary's purposes, but instead directs the courts to determine whether regulations have been adopted which in fact cover the subject matter of train speed....We thus conclude that respondent's excessive speed claim cannot stand in light of the Secretary's adoption of the regulations in § 213.9.*

Id. At 1742-43 (emphasis added).

Easterwood holds that a state-law claim for excessive train speed is preempted by the FRSA and cannot be maintained if the train was operating within the federally-mandated speed limit. *Easterwood* also makes clear that preemption is mandated regardless of the reason for the adoption of the Secretary's regulation (*e.g. to* prevent derailment). To hold otherwise would open the issue of train speed to *ad hoc* determinations that completely undermine the FRSA.

II. THE OKLAHOMA OPINION CREATES A CONFLICT BETWEEN STATE AND FEDERAL LAW, AND ALLOWS OKLAHOMA MUNICIPALITIES TO BE EXEMPT FROM PROVISIONS OF THE FEDERAL RAILROAD SAFETY ACT.

A. The Oklahoma Decision Is In Conflict With Federal Law.

The Oklahoma Courts' decision is in conflict with the provisions of the FRSA and this Court's decision in *Easterwood*, as well as every other federal court decision which addresses the authority of municipalities to regulate train speed. *See, e.g., Eldridge v. Missouri Pac. R.R. Co.,* 832 F.Supp. 328 (E.D. Okla. 1993); *Wright v. Illinois Cent. R.R. Co.,* 868 F.Supp. 183 (S.D. Miss. 1994); *Armstrong v. Atchison, Topeka & Santa Fe Ry. Co.,* 844 F. Supp. 1152 (W.D. Tex. 1994). Federal courts uniformly hold that if the speed of a train complies with the federal regulations, any common

law claim that the train was traveling in excess of a safe rate of speed is preempted by the FRSA. *See, e.g., Bowman v. Norfolk Southern Ry. Co.*, 832 F.Supp. 1014 (D. S.C. 1993); *Watson v. Rail Link, Inc.*, 826 F.Supp. 487 (S.D. Ga. 1993).

Even if the City of Fort Gibson's ordinance had been promulgated under the express state constitutional authority (which it was not), it still would be preempted by the provisions of the FRSA. *City of Covington v. Chesapeake & Ohio Ry.*, 708 F.Supp. 806, 808-809 (E.D.Ky. 1989); *CSX Transp., Inc. v. City of Thorsby*, 741 F.Supp. 889, 891 (M.D,Ala. 1990); and *CSX Trans., v. City of Plymouth, Mich.*, 86 F.3d 626 (6th Cir. 1996) (dealing with a crossing blocking ordinance).

The Oklahoma courts have failed to articulate any justification for excepting Oklahoma municipalities from the provisions of the FRSA. That conflict is especially troubling in light of the Federal Railroad Safety Act's mandate for establishing nationally uniform law for railroad safety. 49 U.S.C. § 20106) (as amended, this section formerly at 45 U.S.C. § 434).

B. The Oklahoma Decision Allows Oklahoma Trial Courts to Unconstitutionally Require Trains in Oklahoma to Abide By Myriad Local Train Speed Ordinances.

Federal courts have uniformly held that municipal ordinances purporting to limit the speed of trains passing through city limits are preempted by the FRSA, and thus void under the Supremacy Clause.

> The plain language of [45 U.S.C. § 434, now 49 U.S.C. § 20106] indicates that only a *state* may adopt a more stringent railway safety law in response to a local safety hazard. Congress is presumed to use words in their ordinary sense unless it expressly indicates the contrary. Since municipalities are not included in this preemption exception, municipalities are preempted from passing more stringent train speed limits than those set out in 49 C.F.R. Sec. 213. *In short ... municipal speed limits are preempted under the supremacy clause of the U.S. Art. VI, Cl. II.*

Chesapeake & Ohio Ry. Co. v. City of Bridgman, 669 F.Supp. 823, 826 (W.D.Mich. 1987) (citations omitted) (emphasis added). Federal courts have also uniformly held that any *state* statute which purports to delegate power to the cities to regulate train speed is unconstitutional by virtue of the Supremacy Clause. *City of Bridgman,* 669 F.Supp at 826; *Consolidated Rail Corp. v. Smith,* 664 F.Supp. 1228, 1230 (N.D.Ind. 1987); *City of Covington v. Chesapeake & Ohio Ry.Co.,* 708 F.Supp. 806, 808 (E.D.Ky. 1989).

The reasons why municipalities cannot regulate train speed were well stated in *Consolidated Rail Corp. v. Smith,* 664 F.Supp. 1228 (N.D.Ind. 1987), where the court explained:

> [Allowing municipalities to regulate train speed] utterly would defeat Congress' purpose in enacting the FRSA - enhancement of railroad safety by making railroad regulation uniform. Congress was concerned that the existence of fifty separate regulatory systems

> in the fifty states would undermine safety. If so, separate regulation by every city, village, township, or hamlet along the mainline would undermine safety infinitely more. Separate municipal regulation of speed is so greatly at odds with the Congressional purpose of uniformity as to need no further argument.

Id. at 1238.

Additionally, in Section 20106 (formerly § 434), Congress manifested its unwillingness to provide the States any broader role in the regulation of railroads because it did not believe that "safety in the nation's railroads would be advance sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." H.R. Rep. No. 1194, 91st Cong., 2d Sess. 11, 19 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109. The intent to establish a national uniform body of regulation flowed from a legislative recognition that the rail industry is a national, not ***local***, transportation system:

> [T]he railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character ***calling for a uniform body of regulations*** and enforcement ... ***To subject a carrier to enforcement before a number of different state and administrative judicial systems in several areas of operation could well result in an undue burden on interstate commerce.***

Id. at 4110-11(emphasis added). Obviously, allowance of control of train speed by thousands of separate local municipalities would violate this clearly-stated Congressional intent. Allowing municipalities to burden interstate commerce and jeopardize safety by subjecting interstate trains to a variety of speed restrictions is what Congress and the resulting federal courts have worked to avoid.

CONCLUSION

The Petition for Writ of Certiorari should be granted. Does the Federal Railroad Safety Act govern the speed of a train through a city, and, therefore, preempt all municipal ordinances and resulting claims based on excessive speed? The public and the railroad industry need a definitive answer from this Court.

Respectfully submitted,

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Attorneys for Petitioner Missouri Pacific Railroad Company d/b/a Union Pacific Railroad Company

January 10, 1997

FILED

961103 JAN 1 3 1997

No.

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

MISSOURI PACIFIC RAILROAD COMPANY d/b/a UNION PACIFIC RAILROAD COMPANY
a Delaware Corporation

Petitioner,

v.

JAMES M. JOHNSON and FRANCIS L. JOHNSON, as Representatives of the ESTATE OF JEREMY MICHAEL JOHNSON, Deceased,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

---

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

SUPREME COURT ORDER

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

JAMES M. JOHNSON AND FRANCES L. JOHNSON, as Representatives of the Estate of Jeremy Michael Johnson, Deceased — APPELLEES

V. — No. 84,527

MISSOURI PACIFIC RAILROAD d/b/a UNION PACIFIC RAILROAD COMPANY, a Delaware Corporation — APPELLANT

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

CERTIORARI DENIED
CONCUR: WILSON, C.J, KAUGER, VC.J., SIMMS, HARGRAVE, SUMMERS, WATT, JJ.
DISSENT: HODGES', LAVENDER, OPALA, JJ.

DATE ENTERED: October 16, 1996

/s/
ALMA WILSON
CHIEF JUSTICE

FILED SUPREME COURT
STATE OF OKLAHOMA
DATE: OCTOBER 16, 1996
JAMES W. PATTERSON, CLERK

APPENDIX B

IN THE COURT OF APPEALS, DIVISION 4

STATE OF OKLAHOMA

JAMES M. JOHNSON and FRANCES L. JOHNSON, as Representatives of the Estate of Jeremy Michael Johnson, deceased,	)	
Appellees,	)	
vs.	)	No. 84,527
	)	NOT FOR PUBLICATION
MISSOURI PACIFIC RAILROAD COMPANY d/b/a UNION PACIFIC RAILROAD COMPANY, a Delaware corporation	)	
Appellant	)	

FILED COURT OF APPEALS
STATE OF OKLAHOMA
DATE: JULY 16, 1996
JAMES W. PATTERSON, CLERK

APPEAL FROM THE DISTRICT COURT OF
MUSKOGEE COUNTY, OKLAHOMA

Bill Settle
Settle & Landrum
Muskogee, Oklahoma

John W. Norman
Thomas A. Wallace
L. Mark Bonner

Charles F. Mosser
Norman, Edem, McNaughton
& Wallace, P.A.
Oklahoma City, Oklahoma — For Appellees

Richard E. Howard
Tom L. Armstrong
Kenneth J. Treece
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Tulsa, Oklahoma — For Appellant

MEMORANDUM OPINION

REIF, J.

Missouri Pacific Railroad company appeals the judgment entered against it in favor of the parents of Jeremy Johnson in this wrongful death lawsuit. Jeremy had been the driver of a pickup truck which was struck by a train at an unprotected crossing in Fort Gibson. After hearing the evidence, the trial court made a special finding that Parents had proven by clear and convincing evidence that Railroad's conduct evinced a wanton or reckless disregard for the rights of another, oppression, fraud or malice so as to allow the jury to return a verdict for punitive damages in excess of the actual damages awarded. While the jury found Jeremy and Railroad to be equally at fault, it found Railroad to be guilty of wanton, reckless, or intentional conduct and awarded punitive damages in excess of the actual damages.

Railroad's allegations of error on appeal can be categorized into errors concerning the admission of evidence and the conduct of the trial, and errors in the jury instructions. When addressing error in the admission of evidence and the conduct of the trail, the determinative issue is whether the trial judge abused his discretion in making his

rulings and whether the abuse materially affected the substantial rights of the complaining party. Lee v. Volkswagen of America, Inc., 688 P.2d 1283, 1290 (Okla. 1984); see also Middlebrook v. Imler, Tenny & Kugler M.D.'s, Inc., 713 P.2d 572 (Okla. 1985).

Without addressing each of the individual items of error alleged by Railroad, we would note that we have scrutinized the record on appeal and with the exception of the "speed issues," we find this case to have been well and fairly tried by both counsel and the trial court. We find no error in the trial court's rulings on the admissibility of evidence, the conduct of the trial itself, or the submission of the punitive damages claim.

The "speed issues" concern the application of a federal statutes found in the Federal Railroad Safety Act, formerly 45 U.S.C. §§ 421-447 (1986), now recodified at 49 U.S.C. §§ 20101-26102 (1994). The pertinent part states:

> § 20106. National uniformity of regulation
>
> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order

> related to railroad safety when the law, regulation, or order --
>
> (1) is necessary to eliminate or reduce an essentially local safety hazard;
>
> (2) is not incompatible with a law, regulation, or order of the United State Government; and
>
> (3) does not unreasonably burden interstate commerce.

Pursuant to this statute, the Secretary of Transportation promulgated regulations setting the maximum allowable operating speeds for trains according to the class or type of track upon which they operate. This statute has been interpreted by the United States Supreme Court in CSX Transportation v. Easterwood, 507 U.S. 658 (1993). The court held that "federal regulations adopted by the Secretary of Transportation pre-empt [a plaintiff's] negligence action only insofar as it asserts that [a defendant's] train was traveling at an excessive speed." Id. at 676. Our inquiry must then focus on whether the trial court's admission of evidence concerning the train's speed, Fort Gibson's train speed ordinance, and the alleged agreement by Railroad to abide by a lower speed limit was erroneous. Also involved in this inquiry is the trial court's instructions touching upon the speed issues. While it is apparent that Parents assert that the train was traveling at an excessive speed, their claim is not solely one for negligence due to excessive speed. Railroad had a duty to operate the train safely, with due regard for the locale and other conditions. Evidence of the train's actual speed, Railroad's policies concerning speed, Railroad's knowledge of the conditions at the Fort Gibson crossings including previous near misses, and evidence of Railroad's prior involvement and "agreement"

with the city of Fort Gibson concerning trains speed limits all are admissible to prove elements of negligence other than just negligence due to excessive speed. We find no error in the admission of evidence concerning the "speed issues."

Railroad's predominant allegation of error on appeal is that based upon federal preemption of speed regulation the trial court erred when it instructed the jury that failure of Railroad to comply with the Fort Gibson trains speed limit ordinance would be negligence per se. Because we are constrained by stare decisis to follow the supreme court's interpretation that the federal regulations preempt an action based on excessive speed alone, we must determine whether the giving of this instruction, while perhaps erroneous, was prejudicial to Railroad in such a way that the jury would not have returned the verdict it did but for the erroneous instruction. Oklahoma Ry. Co. v. Wilson, 231 P.2d 688 (Okla. 1951). When we consider that the jury found Jeremy to be equally negligent with Railroad for the collision, we cannot say that the negligence per se instruction impacted Railroad in a manifestly prejudicial way. This is bolstered by the additional finding by both the trial court and the jury that Railroad was more than just grossly negligent. Both found the conduct of Railroad to be wanton, oppressive, malicious, reckless to the point of disregard for the rights of others, or, perhaps, even intentional as it concerned the operation of the train through Fort Gibson at the time of the collision with Jeremy. We are persuaded that the jury heard the evidence, understood the actions and obligations of the parties, and returned a verdict which reflected their judgment. We do not believe that the negligence per se instruction was so prejudicial in light of the rest of the instructions as to require reversal of the verdict. We also find that the trial court's entry of judgment on the verdict to be proper.

AFFIRMED.

TAYLOR, P.J., and RAPP, C.J., concur

July 16, 1996

APPENDIX C

JURY INSTRUCTION NO.: 24

NEGLIGENCE PER SE -- VIOLATION OF ORDINANCE (MODIFIED)

In addition to the duty to exercise ordinary care there are also duties imposed by statutes or ordinances. If you find that Missouri Pacific Railroad violated the following ordinance and the violation was the direct cause of the injury, then such violation in and of itself would make Missouri Pacific Railroad negligent. There was in force and effect in the City of Fort Gibson at the time of the occurrence the following ordinance:

Ordinance No. 1973-2-2: Section 1

> It is unlawful for any person, firm, or corporation to operate, drive or propel, or cause to be operated, driven or propelled any railway engine for a greater speed than forty (40) miles per hour when entering an intersecting street or avenue within the incorporated limits of the town of Fort Gibson, Muskogee County, Oklahoma.

Kurn v. Adair, 178 P.2d 104 (Okla. 1946);
Missouri-Kansas-Texas Railway Co. v. Dodson, 356 P.2d 1079 (Okla. 1960)

APPENDIX D

JURY INSTRUCTION NO.: 25

You are instructed that a state **[or municipality]** may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. §434

APPENDIX E

JURY INSTRUCTION No.: 26

If you find that the Walnut Street crossing constituted a specific individual hazard because unique local conditions presented local safety hazards, then Missouri Pacific Railroad had a duty to reduce its speed to the level specified in the Ft. Gibson City Ordinance.

CSX Transp., Inc. v. Easterwood, 507 U.S. ___, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993); CSX Transp., Inc. v. Easterwood, 507 U.S. __, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993)

APPENDIX F

JURY INSTRUCTION NO.: 28

If you find that Jeremy Michael Johnson was injured as a result of Missouri Pacific Railroad's failure to fulfill an agreement with the City of Fort Gibson to operate its trains at 40 miles per hour through the City of Fort Gibson and to look into correcting the blind corners at the railroad grade crossings in Fort Gibson then you may award those damages sustained as a result of such failure.

Brown v. Wichita State Univ., 540 P.2d 66, 73 (Kan. 1975)

APPENDIX G

IN THE SUPREME COURT FOR THE
STATE OF OKLAHOMA

JAMES M. JOHNSON and FRANCES L. JOHNSON, as Representatives of the ESTATE OF JEREMY MICHAEL JOHNSON, Deceased,	)
Plaintiffs/Appellees,	)
-vs-	)No.84527
MISSOURI PACIFIC RAILROAD COMPANY, d/b/a UNION PACIFIC RAILROAD COMPANY, a Delaware corporation,	)
Defendant/Appellant.	)

DATE FILED
SUPREME COURT
AUGUST 2, 1996
JAMES W. PATTERSON, CLERK

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Defendant/appellant Missouri Pacific Railroad Company, d/b/a Union Pacific Railroad Company ("Missouri Pacific"), respectfully asks this Court to grant a writ of certiorari to review the unpublished Court of Appeals opinion issued in this case on July 16, 1996. A copy of the opinion is attached. No rehearing was sought.

The opinion of the Court of Appeals decided a question of substance involving the preemption of federal law not heretofore determined by this court. In its effort to affirm a jury's verdict in a tragic case, the court erroneously decided that question of federal law in a way not in accord with applicable decisions of the Supreme Court of the United States. In so doing, the court also sanctioned such a departure from the accepted and usual course of judicial proceedings by a trial court as to call for the exercise of this court's power of supervision.

I

This is an appeal from a judgment on a jury verdict in a wrongful death lawsuit resulting from a train/pickup truck collision in 1991 in which six of the eight teenage truck passengers died. There was competent evidence presented that Jeremy Johnson, the driver of the truck, had driven up behind another vehicle which was waiting for the train to pass, then turned onto a street parallel to the tracks and accelerated toward the crossing two blocks south, where the collision occurred. Jeremy's parents sued Missouri Pacific and the train's engineer. The jury found *no* liability on the part of the engineer, and found Jeremy to have been *equally at fault* with Missouri Pacific. The jury returned a verdict against Missouri Pacific for $1 million in actual damages and $3 million in punitive damages. Judgment on the jury verdict was entered on November 21, 1994.

II

The basis of the plaintiffs' case was that a Missouri Pacific train, recklessly speeding through an ultrahazardous intersection, killed their son. The theory that the train was not merely speeding, but *wantonly* speeding, *permeated* the trial. Most significantly, the trial court lifted the cap on punitive damages because it expressly found, not that the

intersection was ultrahazardous or that Missouri Pacific was in some other way malicious, wanton or reckless, but that "[i]n my view, the evidence shows that if this train. . . had commenced slowing ... that this collision would not have occurred. There's absolutely no question in my mind that it would not have occurred the way it did occur."

It was undisputed that the train in question was going 48-50 mph at the time of the collision. The railroad tracks in Fort Gibson had a Class IV Federal Railroad Administration (FRA) classification. Under FRA rules, promulgated pursuant to the Federal Railroad Safety Act of 1970 (the FRSA), formerly 45 U.S.C. §§ 421-447 (1986), now recodified at 49 U.S.C. §§20101-26102 (1994), the maximum speed for freight trains on Class IV track is 60 mph. 49 C.F.R. § 213.9. Missouri Pacific was well within the federal speed limit at the time of the accident.

In 1973, however, Fort Gibson arguably had passed a city ordinance (never advertised, recorded or published) regulating train speed through town at 40 mph. It is noteworthy that on the evening of the collision, the weather was dry with good visibility and there were no other hazards apparent on the track. There was no finding by the jury that the engineer's speed was too fast for the particular track conditions at the time of the collision. Thus, the Plaintiffs relied solely on the 1973 ordinance to prove their theory that the train was speeding through town, rendering Missouri Pacific negligent *per se*. The trial court agreed with Plaintiffs, and instructed the jury accordingly.

III

Was Missouri Pacific's train speeding as a matter of law or not? Succinctly put, the primary question raised by this case is this: Which law governs the speed of a train through a city or town in Oklahoma - the FRSA or municipal ordinance? *The Court of Appeals' opinion fails*

to satisfactorily answer this question of significant importance to municipalities and to railroads operating within Oklahoma.

Section 20106 of the FRSA provides as follows:

> Laws, regulations and orders related to railroad safety shall be *nationally uniform* to the extent practicable. A *State* may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A *State* may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order-
>
> (1) is necessary to eliminate or reduce an essentially local safety hazard;
> (2) is not incompatible with a law, regulation, or order of the United States government; and
> (3) does not unreasonably burden interstate commerce. (Emphasis added.)

The relevant legislative history makes clear that the purpose for which the statute was enacted was to create national uniformity of regulation, such as in the Natural Gas Pipeline Safety Act of 1968, thereby enhancing safety by eliminating 50 different judicial and administrative systems for railroads to follow. Obviously, allowance of control of train speed by thousands of separate local municipalities would annihilate this clearly-stated Congressional intent.

Recently, the U. S. Supreme Court in CSX Transportation v. Easterwood, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed. 387 (1993) *affirmed in favor of the railroad* a grant of summary judgment on a widow's claim under state law for excessive speed when that speed was within the limits set under the FRSA. In Easterwood, as in this case,

the plaintiff's decedent was killed when a train collided with the truck he was driving. The plaintiff widow alleged that the railroad was negligent in failing to maintain adequate warning devices *and* for operating the train at excessive speed. The Court unequivocally held that the speed regulations issued by the Secretary of Transportation pursuant to the FRSA preempted state common law claims based on excessive train speed. Easterwood, 113 S.Ct. at 1743-1744. The Court stated:

> [R]elated safety regulations adopted by the Secretary reveal that the limits were adopted only after the hazards posed by track conditions were taken into account. Understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation of the sort which respondent seeks to impose on petitioner.
>
> * * *
>
> Read against this background, § 213.9(a) should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings. *Respondent nevertheless maintains that preemption is inappropriate because the Secretary's primary purpose in enacting the speed limits was not to ensure safety at grade crossing, but rather to prevent derailments. Section 434 does not, however, call for are inquiry into the Secretary's purposes, but instead directs the courts to determine whether regulations have been adopted which in fact cover the subject matter of train speed ....* We thus conclude that respondent's excessive speed claim cannot stand in light of the Secretary's adoption of the regulations in § 213.9 (footnote omitted). (Emphasis added.)

> We hold that, under the Federal Railroad Safety Act, federal regulations adopted by the Secretary of Transportation pre-empt respondent's negligence action only insofar as it asserts that petitioner's train was traveling at an excessive speed.

Id. at 1743-44.

Easterwood makes clear that a state-law claim for excessive train speed is preempted by the FRSA and cannot be maintained if the train was operating within the federally-mandated speed limit. Easterwood also makes clear that preemption is mandated regardless of the reason for the adoption of the Secretary's regulation (*e.g.* to prevent derailment). All lower federal courts which have directly addressed this issue have uniformly held that municipal regulation is preempted. *See, e.g.,* Eldridge v. Missouri Pac. R.R. Co., 832 F.Supp. 328 (E.D. Okla. 1993); Wright v. Illinois Cent. R.R. Co., 868 F.Supp. 183 (S.D. Miss. 1994); Armstrong v. Atchison, Topeka & Santa Fe Ry. Co., 844 F. Supp. 1152 (W.D. Tex. 1994).

The Court of Appeals' opinion in this case errs when it does not resolve or even discuss the merits of the federal preemption issue or clearly define Oklahoma law for the benefit of railroads and municipalities. Secondly, although the opinion *admits* that "we are constrained by stare decisis to follow the supreme court's [sic] interpretation that the federal regulations preempt an action based on excessive speed alone," it then fails to follow that clear precedent in its analysis and result. Following the precedent of Easterwood, the Court of Appeals should have found that the entire theory of excessive speed as negligence *per se* should not have been submitted to the jury as a matter of law. Instead, however, the appellate court chose to view excessive train speed not as a unified theory, but merely as a disparate series of rulings regarding the admission of various evidence, all of which it then affirmed. More substantially, it ignored the Easterwood precedent when it found no error in two jury instructions, one of which (Instruction No. 24) defined violation of the Fort Gibson ordinance as

negligence *per se* and the other (Instruction No. 25), to which the trial judge added the words "or municipality" to the otherwise exact quotation of FRSA § 20106, a completely arbitrary addition to Congress' actual wording. Instead of following Easterwood, the Court of Appeals merely finds the negligence *per se* instruction to be "perhaps erroneous," but not "prejudicial to Railroad in such a way that the jury would not have returned the verdict it did but for the erroneous instruction."

The appellate court's error is most evident on page two, where it *adopts the wrong standard of review*. It states that the issues to be reviewed are errors concerning the"admission of evidence and the conduct of the trial," and states as the standard of review "whether the trial judge abused his discretion in making his rulings and whether that abuse materially affected the substantial rights of the complaining party," citing Lee v. Volkswagen of America, Inc., 688 P.2d 1283 (Okla. 1984) and Middlebrook v. Imler, Tenny & Kugler M.D.'s, Inc., 713 P.2d 572 (Okla. 1985). However, submission of the speeding train evidence adds up to more than just the cumulative effect of disparate trial court rulings - it is a theory of recovery which the U.S. Supreme Court has found cannot be maintained. The correct standard of review is found in Vannerson v. Board of Regents, 784 P.2d 1053 (Okla. 1989). In Vannerson, a wrongful discharge case, much of the evidence relied upon by the plaintiff for recovery was based on an occurrence for which the plaintiff could not recover as a matter of law. This court stated:

> Although ordinarily a jury verdict will be sustained if supported by any competent evidence, (citation omitted), such is not the case if it is impossible on appellate review to separate plaintiff's possible recovery on properly submitted facts from his possible recovery on facts which should have not been submitted as a basis for recovery at all.

Id. at 1055-56, citing Guinn v. Church of Christ, 775 P.2d 766 (Okla. 1989). The Court of Appeals did not even attempt to determine whether or not it was impossible to separate plaintiff's recovery between properly and improperly submitted facts; had it done so, it would have found that the trial was so imbued with the admission of evidence surrounding the speed of the train, the passage of the preempted ordinance, repeated reference to the "speeding train," and the like so as to have put the jury in a complete muddle. It cannot be discerned whether the verdict was based on excessive train speed or whether it was based on failure to maintain a safe crossing and/or maintain an adequate warning system. These are completely separate duties owed by the railroad to the motoring public.

IV

The tenor and fairness of the trial was also materially and significantly affected by the submission of numerous items of evidence, to Missouri Pacific's undeniable prejudice, yet the Court of Appeals merely lumped all "rulings on the admissibility of evidence" into an overbroad, blanket affirmance. For example, the trial court admitted evidence of a prior accident and three "near misses" at the crossing in question. The prior accident, however, occurred almost twenty years before the collision in question. Plaintiffs argued that admission of the prior accident was proper to show the motivation of the city to pass the 1973 ordinance; however, instead of limiting the evidence to that fact, the court allowed admission of an old newspaper photograph, graphically depicting the fatality crash involved in the prior accident accompanied by a small, unrecognizable portion of the subject crossing, which could not be verified as bearing any similarity to the conditions existing on the night of the 1991 collision. The old photograph's probative value was vastly outweighed by its danger of unfair prejudice to Missouri Pacific.

Similarly, the trial court allowed evidence of three prior "near misses" at the crossing, all of which happened under materially different circumstances as the collision in question. Under its

generalized ruling regarding evidence, the Court of Appeals affirmed. This Court has made clear, however, that evidence of other railroad crossing accidents is inadmissible unless they happened under the same circumstances and at the same place as the accident involved in the suit. St. Louis-San Francisco Ry. Co. v. Powell, 385 P.2d 465, 468-9 (Okla. 1963), citing Foreman v. Chicago R.I. & P. Ry. Co., 74 P.2d 350, 352 (Okla. 1937). Prior "near misses" are considered under the same legal rubric as prior accidents. Robinson v. Missouri Pac. R.R. Co., 16 F.3d 1083, 1089-90 (10th Cir. 1994). The prejudice to a defendant by the admission of such evidence cannot be overemphasized, and is *reversible error*. Roper v. Mercy Health Ctr., No. 84615, THE OKLAHOMA BAR JOURNAL, Vol. 66, No. 28, p. 2396-97 (July 18, 1995). This rule of exclusion has also been widely adopted in other jurisdictions. Carter v. Missouri Pac. R.R. Co., 681 S.W.2d 314, 316 (Ark, 1984); DeElena v. Southern Pac. Co., 592 P.2d 759, 764 (Ariz. 1979); Missouri Pac. R.R. v. Cooper, 563 S.W.2d 233, 236 (Tex. 1978); Mead v. Scott, 130 N.W.2d 641, 644 (Iowa 1964).

These are but two examples in which the Court of Appeals simply failed to apply the correct rule of law in its analysis of the numerous errors in the admission of evidence and conduct of the trial raised by this appeal.

V

The Court of Appeals' opinion further completely fails to address a critical error occurring after the jury had returned its verdict. In Jury Instruction No. 49, which was approved by all counsel, the jury was instructed as follows:

> If you find that the occurrence was directly caused by the negligence of either or both of Missouri Pacific Railroad and/or [Engineer] and the contributory negligence of Jeremy Michael Johnson, then you shall use the white verdict form, and you must determine the percentages of each party's negligence.

* * *

> You are instructed that if you use the white verdict form, whatever dollar amount you insert as the damages sustained by Plaintiffs *will be reduced by the court* by that percentage of negligence which you have attributed to Jeremy Michael Johnson. (Emphasis added.)

The jury returned a verdict finding Missouri Pacific 50% liable and Jeremy Johnson 50% liable. After the jury returned its verdict, however, the court, at Plaintiffs' behest, refused to reduce the damages awarded in accordance with what it had already told the jury, and denied Missouri Pacific the opportunity to propose additional, curative instructions. The trial court based its refusal to reduce the damages in accordance with Instruction No. 49 on the language in Graham v. Keuchel, 847 P.2d 342, 362-63 (Okla. 1993), regarding the unavailability of the contributory negligence defense in cases of willful or wanton conduct on the part of the defendant. In Graham, however, this court determined that a jury *must be instructed* that "while ordinary negligence of the plaintiff may be used as a defense against gross negligence, it may not be considered as a defense against any form of conduct found to be willful and wanton or intentional." *The jury was not so instructed.* It was thus completely misled as to the law and as to what the "bottom line" of damages awarded would be. This resulted in Missouri Pacific's liability for twice what the jury had intended.

Despite this prejudicial error, the Court of Appeals failed completely to address the issue or to order reversal of a clearly prejudicial instruction or order a remittur to bring the award in line with the jury's intent.

VI

Finally, the Court of Appeals ignored without comment Missouri Pacific's allegations of error on appeal regarding submission of punitive damages to the jury. First, as stated above, the sole reason

for the trial judge's ruling lifting the "cap" on punitive damages was because of the train's speed. As established by Easterwood, the train's speed did not even breach Missouri Pacific's duty of ordinary care, much less evidence wanton, oppressive, malicious or reckless conduct. The Court of Appeals did not even attempt to review the admission of evidence and instructions regarding punitive damages, other than to conclude, with incredible logic, that because the trial court and jury had found Missouri Pacific to be wanton and oppressive, etc., *submission of the admittedly erroneous train speed theory had not been prejudicial.* This clearly misses two obvious points - 1) if the jury had not been instructed that the train's speed was negligent, perhaps they would not have found Missouri Pacific's conduct wanton; and 2) ordinary negligence *per se* does not equal wanton conduct. The appellate court disregarded the law regarding the prerequisites for submission of punitive damages and failed to analyze the facts in accordance therewith.

Based on the foregoing errors, Missouri Pacific respectfully requests that this Court grant a writ of certiorari, vacate the opinion of the Court of Appeals and the trial court's judgment, and remand this action for further proceedings consistent with Oklahoma law and this Court's decision.

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APPENDIX H

IN THE SUPREME COURT FOR THE
STATE OF OKLAHOMA

JAMES M. JOHNSON and FRANCES L. JOHNSON, as Representatives of the ESTATE OF JEREMY MICHAEL JOHNSON, Deceased,	)
Plaintiffs/Appellees,	)
-vs-	)No.84527
MISSOURI PACIFIC RAILROAD COMPANY, d/b/a UNION PACIFIC RAILROAD COMPANY, a Delaware corporation,	)
Defendant/Appellant.	)

DATE FILED
SUPREME COURT
AUGUST 21, 1996
JAMES W. PATTERSON, CLERK

DEFENDANT/APPELLANT'S REPLY TO ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Defendant/Appellant Missouri Pacific Railroad Company, d/b/a Union Pacific Railroad Company ("Missouri Pacific") submits this Reply and respectfully asks this Court to grant a writ of certiorari to review the Court of Appeals' opinion which decided a question of substance involving the preemption of federal law not heretofore

determined by the Court nor in accord with applicable decisions of the Supreme Court of the United States.

I.

Since the preemptive Federal Railroad Safety Act of 1970, not one reported case has ever held (as this trial court instructed) that municipalities can regulate train speed. Every court that has directly addressed the authority of municipalities to regulate train speed under the FRSA has held that no such authority exists. See, e.g., Donelon v. New Orleans Terminal Co., 474 F.2d 1108 (5th Cir. 1973), cert. denied, 414 U.S. 855 (1973); Chesapeake & O. Ry. v. City of Bridgman, 669 F.Supp. 823, 826 (W.D. Mich. 1987). FRSA preempts municipal ordinances related to railroad safety, notwithstanding that the ordinance was promulgated under state constitutional authority. See, e.g., CSX Trans., Inc. v. City of Plymouth, Mich., 86 F.3d 626, 628 (6th Cir. 1996)

Plaintiffs' statement of the case is nothing more than a plea for sympathy. The statement distorts the record on appeal in an attempt to distract this Court from the legal issues which were not addressed by the Court of Appeals. The testimony of two unbiased witnesses showed that the sixteen year old Jeremy Johnson's pickup truck (in which five people were crammed in the cab and three in the covered pickup bed) had driven up behind a vehicle stopped at a railroad crossing. The lights were flashing and gates were coming down, and the driver turned on a parallel road and accelerated at a high rate of speed toward the Walnut Street crossing in an obvious attempt to beat the train. The record demonstrates that Jeremy Johnson was familiar with the characteristics of this railroad crossing.

Plaintiffs' statement that nine deaths occurred at Fort Gibson crossings in less than two years is misleading. Prior to Jeremy Johnson's accident, there had been only one known automobile/train accident in the city's history (which happened at the Walnut Street crossing in 1972, almost 20 years before).

Plaintiffs' statement that the Walnut crossing was one of the most hazardous crossings in Oklahoma is inaccurate. The Manager of Rail/Highway Safety for the Oklahoma Department of Transportation testified that the Walnut Street crossing was not high on the Department of Transportation hazard priority index and that none of the crossings in Fort Gibson would have qualified for improvements under that index. Fort Gibson was selected for a corridor project because the city had several crossings within a short track distance, some of which could be consolidated and eliminated, not because any of the crossings were extra-hazardous.

It was undisputed that Missouri Pacific was well within the federal speed limit (60 mph for Class IV track) pursuant to the Federal Railroad Safety Act of 1970 (the "FRSA"). The Plaintiffs discuss the Fort Gibson city ordinance regulating train speed through town at 40 mph as if it was common knowledge to the town and Missouri Pacific. However, the city ordinance was never contained in the ordinance book which was used by the law enforcement officers of the city. In fact, existence of the ordinance was unknown to the Fort Gibson's Mayor, Police Chief, police force and Missouri Pacific.

II.

The Plaintiffs claim that there is no federal preemption because the crossing was extrahazardous due to essentially local safety hazards, and that municipalities can regulate train speed under the FRSA. The United States Supreme Court in CSX Transportation v. Easterwood, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed. 387 (1993), makes clear that a state-law claim for excessive train speed is preempted by the FRSA and cannot be maintained if the train was operating within the federally-mandated speed limit. The Easterwood exception governing "specific, individual hazards" does not authorize municipal regulation of train speed. In Easterwood, the Court referred to a common law duty to slow or stop the train to avoid a "specific, individual hazard". The Court did not decide whether any such duty actually existed or whether such a duty did exist, the FRSA would preempt it. However, it is clear

from the context of the Court's opinion that the "specific, individual hazard" exception discussed in Easterwood does not apply to the Walnut Street crossing. The presence, if any, of "specific, individual hazards" at the Walnut Street crossing is irrelevant to the authority of the City of Fort Gibson to enact a train speed ordinance.

Moreover, the Walnut Street crossing does not present a "specific, individual hazard" as that phrase has been interpreted by lower courts. See Herriman v. Conrail, Inc., 883 F.Supp. 303, 306-07 (N.D. Ind. 1995); Armstrong v. Atchison, Topeka & Santa Fe Ry. Co., 844 F.Supp. 1152 (W.D. Tex. 1994). Logically, "specific, individual hazard" relates to the avoidance of a specific collision, such as where an engineer sees a motorist stranded on the tracks in time to avoid the collision. See Herriman, 883 F.Supp. at 307; Armstrong, 844 F.Supp. at 1153.

The case of Missouri Pacific RR. Co. v. Lemon, 861 S.W.2d 501 (Tex. Ct. App. 1993), relied on by the Plaintiffs, does not support Plaintiffs' argument. In Lemon, the court held that "illegally and improperly parked tank cars created a specific, individual hazard ...". Id. at 510. The court did not rely on any other factor to justify this finding. Plaintiffs' list of factors concerning the physical characteristics of the crossing were not created by any illegal activity by Missouri Pacific.

The Court of Appeals' opinion errs when it did not follow the precedent of Easterwood and find that, as a matter of law, Plaintiffs' theory of excessive speed and jury instructions related to the same (including a negligence per se instruction) should not have been submitted to the jury.

III.

The sole basis for the submission of the issue of punitive damages to the jury was Missouri Pacific's non-compliance with the City of Fort Gibson's unauthorized (and unknown) train speed

ordinance. Therefore, the Court of Appeals erred in failing to reverse and remand the case to the trial court, with instructions to dismiss the claim for punitive damages.

IV.

The Court of Appeals failed to apply the correct rule of law in its analysis of the errors in the admission of a prior accident and three "near misses" at the crossing in question. Prior to the admission of any prior accident or near miss evidence, this Court requires a showing of substantial similarity with regard to speed and direction of train and vehicle, time of accident, traffic conditions, weather conditions and view of driver. St. Louis-San Francisco Ry. Co. v. Powell, 385 P.2d 465, 469 (Okla. 1963). Plaintiffs contend that there is no need to follow Oklahoma law because their evidence of prior accidents/near misses is admissible on the issue of knowledge. The cases relied on by the Plaintiffs are directly contrary to Oklahoma case law. Under Oklahoma law, to show notice or knowledge of a dangerous condition, prior accidents or near misses must be substantially similar to the accident and litigation in order to be admissible in evidence. Roper v. Mercy Health Center, No. 84615, THE OKLAHOMA BAR JOURNAL, Vol. 66, No. 28, p. 2396-97 (July 18, 1995); Perry v. City of Oklahoma, 470 P.2d 974 (Okla. 1974). Failure of the trial court to require such a showing is reversible error. Roper v. Mercy Health Center, 66 O.B.J. at 2397.

V.

The Court of Appeals opinion failed to address the prejudicial error of the trial court in refusing to reduce the damages in accordance with Jury Instruction No. 49. The instruction, which was approved by all parties, informed the jury that any finding of contributory negligence would reduce Plaintiffs' actual damages. The actions of the Plaintiffs' counsel in proposing Instruction No. 49 and arguing the effect of same to the jury should constitute an estoppel or waiver of any right to later contend that the damage award should not be reduced.

Guinn v. Church of Christ of Collinsville, 775 P.2d 766 (Okla. 1989); Willard v. Ward, 875 P.2d 441 (Okla. Ct. App. 1994).

Based on the foregoing errors, Missouri Pacific respectfully requests that this Court grant a writ of certiorari, vacate the opinion of the Court of Appeals and the trial court's judgment, and remand this action for further proceedings consistent with Oklahoma law and this Court's decision.

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FILED
FEB 12 1997

No. 96-1103

In The

Supreme Court of the United States

October Term, 1996

MISSOURI PACIFIC RAILROAD COMPANY,
d/b/a UNION PACIFIC RAILROAD COMPANY,
a Delaware corporation,

Petitioner,

v.

JAMES M. JOHNSON and FRANCES L. JOHNSON,
as Representatives of the ESTATE OF
JEREMY MICHAEL JOHNSON, Deceased,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals, Division 4, Of The State Of Oklahoma

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there is a compelling reason for the Court to review an unpublished, non-precedential, and non-citable opinion of Division 4 of the Court of Appeals of the State of Oklahoma, which does not raise the question presented in the petition.

2. Whether the opinion of the Court of Appeals of the State of Oklahoma appropriately addresses the issue of federal preemption.

3. Whether the opinion below is based upon an adequate and independent state ground.

4. Whether 49 U.S.C. § 20106 permits a state to adopt or continue in force a law relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard.

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APPENDIX

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, James M. Johnson and Frañces L. Johnson, as representatives of the Estate of Jeremy Michael Johnson, deceased, respectfully request that this Court deny the Petition for Writ of Certiorari, which seeks review of an unpublished opinion of the Court of Appeals, Division 4, of the State of Oklahoma.

STATEMENT OF THE CASE

• The petitioner asks the Court to review an unpublished opinion of Division 4 of the Court of Appeals of the State of Oklahoma. That opinion, under the Oklahoma Supreme Court Rules, "shall not be considered as precedent . . . by any court or cited in any brief. . . . " Oklahoma Supreme Court Rule 1.200(b)(5). Therefore, there are no compelling reasons to review the decision.

• The petitioner alleges that the unpublished opinion of Division 4 of the Court of Appeals of the State of Oklahoma has avoided the issue of federal preemption as addressed in *CSX v. Easterwood*, 507 U.S. 658 (1993). However, the opinion specifically and properly applies *Easterwood* to the facts of this case.

• The petitioner alleges that the opinion below decides an important federal question. However, the opinion below is based upon an adequate and independent state ground. Applying state standards of appellate review, the opinion finds no reversible error. It concludes

that the negligence *per se* instruction the petitioner complains of did not impact the railroad in a manifestly prejudicial way. This Court ordinarily accepts a state appellate court's findings as to what occurred at trial and the basis of the verdict.

• The petitioner alleges that the Federal Railroad Safety Act preempts *all* local regulation of train speed. However, Section 20106 of Title 49 permits a state to adopt or continue in force a law relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard. The record is replete with evidence that the Fort Gibson crossing was an unprotected death trap. Accordingly, the railroad and the town had negotiated and agreed to the safer speed years before.

The Crossing Collision. At 11:10 p.m., January 11, 1991, Jeremy Johnson, age 16, was driving east, about 20 mph, on a residential street in Fort Gibson, Oklahoma. Jeremy was unable to see past the old Trent Hotel on his left until he was only four seconds from the Union Pacific Railroad crossing. The crossing was unprotected. *It had neither installed nor operating lights and gates.* He then looked left, right, and back left. Jeremy's view to his left was so obstructed that he had no time to react and stop his pickup. One second before impact, surviving passengers on Jeremy's right first saw the headlight of a southbound coal train coming from their left. They never heard a whistle.

The petitioner's freight train was traveling at 50 mph – 10 mph faster than the railroad had agreed to operate its trains through the town. The train smashed into Jeremy's pickup, impaled it on the knuckle on the front of

the locomotive, and pushed it 2,250 feet down the tracks. Jeremy and five other young people were killed. Two others were injured. Had the crossing been protected, the collision would not have occurred.

The agreement. After two women were killed at the same crossing almost twenty years before, the railroad and town officials realized that local safety hazards required slower train speeds. They negotiated and agreed to, and the town enacted, a 40 mph speed limit for trains. The railroad also agreed to "investigate the possibility of correcting some blind corners at crossings."

The extrahazardous crossing. Almost two years before Jeremy was killed, the railroad had decided the crossing was so dangerous it should be closed. Nevertheless, it chose not to promptly fulfill its statutory and common law duty to properly maintain safe crossings. Instead, the railroad chose to wait for federal funding to reimburse 90% of its costs. This, despite the railroad's net worth of $1.1 billion and a daily cash flow of $1.1 million in after-tax money.

Causation. The railroad's delay proved to be deadly. The trial court found by clear and convincing evidence that the railroad's conduct showed a wanton, reckless disregard for the rights of others. The jury's verdicts of $1 million actual and $3 million exemplary damages were found by the trial and appellate courts to be reasonable, justified and supported by abundant evidence.

The petitioner's misstatements. The petitioner has misstated facts. The two railroad witnesses *admitted* they could not identify Jeremy Johnson or his vehicle in an attempt "to beat the train," as argued by the petitioner. (p. 6) (App. 1) The two surviving passengers testified

they were never on the street the railroad witnesses described. The train engineer admitted Jeremy was not racing the train, and the two survivors denied the rumor as well. (App. 1-2) Obviously, the jury rejected this contention of the petitioner.

A more egregious misstatement is that the Oklahoma Court of Appeals affirmed the trial court, "avoiding the issue of federal preemption." (p. 6) The Oklahoma Court of Appeals directly addresses federal preemption in its opinion, citing the Federal Railroad Safety Act, formerly 45 U.S.C. §§ 421-447 (1988), now codified at 49 U.S.C. §§ 20101-26102 (1994). It also follows the most recent interpretation of the statute by this Court in *CSX Transportation v. Easterwood*, 507 U.S. 658 (1993).

REASONS WHY THE PETITION SHOULD BE DENIED

SUMMARY OF THE ARGUMENT

There are no compelling reasons for the Court to review an unpublished, non-precedential, and non-citable opinion of a division of an intermediate state appellate court. This is especially true here, where the decision below does *not* avoid preemption. It discusses *Easterwood* at some length and observes that the instruction to the jury on the local ordinance, if erroneous, was harmless. Thus, there is an adequate state ground for the decision below.

Moreover, the jury did not base its verdict on the speed of the train. The only allegation of negligence of the train's engineer was violation of the municipal speed ordinance, and the jury found in favor of the engineer, thus demonstrating that the verdict was not based on

excessive speed. Therefore, the verdict against the railroad was necessarily based upon the presence of an ultra-hazardous crossing with unique local conditions and upon the railroad's failure to install lights and gates.

Federal law specifically permits a state to adopt or continue in force a law relating to railroad safety when necessary to eliminate or reduce essentially local safety hazards. Here, the petitioner negotiated and agreed to such a law.

I.

THERE IS NO COMPELLING REASON TO REVIEW AN UNPUBLISHED, NON-PRECEDENTIAL, AND NON-CITABLE OPINION, WHICH DOES NOT RAISE THE QUESTION PRESENTED IN THE PETITION.

Under the Oklahoma Supreme Court Rules, the unpublished opinion of Division 4 of the Court of Appeals of the State of Oklahoma "shall not be considered as precedent . . . by any court or cited in any brief. . . . " Oklahoma Supreme Court Rule 1.200(b)(5). Therefore, there are no compelling reasons to grant the petition.

The sole Question Presented in the petition (p. i) is: Does the Federal Railroad Safety Act preempt all municipal ordinances which purport to govern the speed of trains through towns and cities in the United States? The petitioner alleges that the unpublished opinion of Division 4 of the Court of Appeals of the State of Oklahoma avoids this question and the issue of federal preemption as addressed in *CSX v. Easterwood*, 507 U.S. 658 (1993).

On the contrary, the opinion properly applies *Easterwood* to the facts of this case. The Court of Appeals of the State of Oklahoma, Division 4, acknowledges this Court's holding in *Easterwood* "that 'federal regulations adopted by the Secretary of Transportation pre-empt [a plaintiff's] negligence action only insofar as it asserts that [a defendant's] train was traveling at an excessive speed.' *Id.* at 676." (App. 6) Therefore, the railroad's contention that the Oklahoma Court of Appeals avoided the issue of federal preemption is untrue.

The Court of Appeals then follows *Easterwood*:

> . . . [W]e are constrained . . . to follow the Supreme Court's interpretation that the federal regulations preempt an action based on excessive speed alone. . . . (App. 6-7)

The Court of Appeals next reasons:

> Our inquiry must then focus on whether the trial court's admission of evidence concerning the train's speed, Fort Gibson's train speed ordinance, and the alleged agreement by Railroad to abide by a lower speed limit was erroneous. Also involved in this inquiry [are] the trial court's instructions touching upon the speed issues. (App. 6)

Finally, the Court of Appeals properly applies the standard of review under Oklahoma law and concludes that any error was harmless.

II.

THE OKLAHOMA OPINION IS BASED UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

The opinion below is based upon an adequate and independent state ground – a procedural rule of general applicability. *See Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875); *Herb v. Pitcairn*, 324 U.S. 117 (1945). Following its discussion of *Easterwood*, the Oklahoma Court of Appeals states:

> . . . [W]e must determine whether the giving of this instruction, while perhaps erroneous, was prejudicial to Railroad in such a way that the jury would not have returned the verdict it did but for the erroneous instruction. *Oklahoma Railway Company v. Wilson*, 231 P.2d 688 (Okla. 1951). When we consider that the jury found Jeremy to be equally negligent with Railroad for the collision, we cannot say that the negligence per se instruction impacted Railroad in a manifestly prejudicial way. This is bolstered by the additional finding by both the trial court and the jury that Railroad was more than just grossly negligent. Both found the conduct of Railroad to be wanton, oppressive, malicious, reckless to the point of disregard for the rights of others, or, perhaps even intentional as it concerned the operation of the train through Fort Gibson and at the time of the collision with Jeremy. (App. 7)

The Court of Appeals then notes:

> We are persuaded that the jury heard the evidence, understood the actions and obligations of the parties, and returned the verdict which reflected their judgment. (App. 7)

Applying state standards of appellate review, the opinion finds any error to be harmless.

> . . . Parents . . . claim is not solely one for negligence due to excessive speed. . . .
>
> * * *
>
> [W]e cannot say that the negligence per se instruction impacted Railroad in a manifestly prejudicial way. . . . We do not believe that the negligence per se instruction was so prejudicial in light of the rest of the instructions as to require reversal of the verdict. (App. 6-7)

This Court ordinarily accepts a state appellate court's findings as to "what occurred at trial" and "the basis of the verdict." *Minneapolis, St. P. & S. Ste. M. Ry. v. Moquin*, 283 U.S. 520, 521 (1931).

III.

THE FEDERAL RAILROAD SAFETY ACT AND *EASTERWOOD* AUTHORIZE STATE REGULATION OF ESSENTIALLY LOCAL SAFETY HAZARDS

The decision below is not in conflict with the FRSA or the Court's decision in *Easterwood*.

The petitioner argues that the "FRSA *EXPRESSLY* [sic] preempts state and local regulation of train speeds." (p. 12). To the contrary, 45 U.S.C. § 434 (now 49 U.S.C. § 20106) expressly *permits* state regulation of train speeds to eliminate an essentially local safety hazard.

> A state may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety

> when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

The plain meaning of Section 20106 is to permit a state to deal with unique local conditions, hazards peculiar to the locality, such as the extraordinary danger of the unprotected Fort Gibson crossing. Local knowledge and local experience are the best and most reliable measure of the need for remedial action, and the form that remedy should take.

Essentially local safety hazards. The crossing was used by school buses, propane trucks, and other motorists. Many unique conditions, including those weighed by traffic engineers considering the need for lights and gates, created specific individual, and essentially local, safety hazards at the crossing. They are: (1) a 20° bend in the roadway just before the crossing; (2) a significantly elevated track; (3) a historical building, the old Trent Hotel, obstructing the view across the northwest corner; (4) a 96.1% deficiency in sight distance needed to safely see a train across the northwest quadrant (the critical area between Jeremy and the train); (5) a hedge and trees limiting visibility across the northwest corner; (6) an old house obstructing the view across the southwest corner; (7) an intersecting street just before the crossing; (8) dual railroad tracks; (9) visual clutter competing for a driver's attention; and (10) a cluster of background city lights blending with the train headlight.

These conditions are essentially local safety hazards at the crossing, which was described at the trial as "unbelievably," "extremely," "extrahazardous." (App. 2) The

restrictions on sight distances are very severe across the quadrant between Jeremy and the train. Because of limited visibility, a school bus loaded with children and a propane truck, which had both stopped, and a motorist traveling 10 mph, had almost been struck by the railroad's freight trains at the crossing. Each motorist was exercising due care. These "near collision" data were maintained by petitioner, but it failed to use the data to improve safety at the crossing.

Nine Deaths in Four Fort Gibson Crossing Collisions within Two Years. The Ft. Gibson corridor was not just dangerous in engineering theory. In less than two years, nine people, including Jeremy, died in four collisions at two Fort Gibson crossings.

State Law. A state may delegate its authority to municipalities. In *Atlantic Coast Line R.R. Co. v. City of Goldsboro*, 232 U.S. 548 (1914), this Court determines that a city ordinance prohibiting the "shifting" of railroad cars within the city limits is a state law:

> A municipal by-law or ordinance, enacted by virtue of power for that purpose delegated by the legislature of the state, is a state law within the meaning of the Federal Constitution. [Citations omitted].
>
> * * *
>
> We must therefore treat the ordinances as legislation enacted by virtue of the lawmaking power of the state.

Here, the State of Oklahoma regulates the speed of trains through the Fort Gibson crossings by the municipal ordinance, which the petitioner negotiated and agreed to.

Oklahoma acts through its municipalities to achieve crossing safety where necessary to prevent accidents at crossings:

> The municipal governing body may . . . regulate the crossing of railway tracks and the running of railway engines, cars, and tracks within the limits of the municipality, and . . . govern the speed thereof, and . . . make provisions, rules and restrictions *to prevent accidents at crossings* and on the tracks of railways.

Okla. Stat. Ann. tit. 11, § 22-119 (West 1991)

CONCLUSION

For these reasons, respondents respectfully request the petition for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX I

* * *

Q. Now, this pickup that you saw go south on Railroad, you don't know for sure that it was the young people involved in this accident; do you?

A. All I know is it was a late model red Chevy pickup. I'm not saying it was that exact truck or not.

Transcript of Jury Trial, Vol. X, p. 29, September 26, 1994 (Testimony of Steven Brewer, railroad witness).

* * *

Q. . . . And, in fact, in your statement, you said you did not know whether this was the pickup involved in the accident; correct?

A. Correct.

Transcript of Jury Trial, Vol. X, p. 44, September 26, 1994 (Testimony of Donella Clopton, railroad witness).

* * *

Q. Sir, is it your opinion, based on your observations that when – from your observation of Jeremy's pickup, that it was not racing the train, to beat the train; correct?

A. Correct.

Transcript of Jury Trial, Vol. V, p. 64, September 16, 1994 (Testimony of Ernest Richardson, railroad engineer).

* * *

Q. Now, you are aware of the fact, aren't you, Thomas, that there was a – a rumor after this that you all had come up here in this direction [indicating], come

around here, and turned, and come down here, and tried – raced the train down here, and tried to beat it across?

A. Yes.

Q. Is that true?

A. No, sir.

Transcript of Jury Trial, Vol. VI, p. 213, September 19, 1994 (Testimony of Thomas Jackson, surviving passenger).

* * *

Q. But you said you wanted to testify?

A. Yes.

Q. Why is that?

A. Because there were too many rumors about that night, and I wanted to – I wanted them to hear my own story.

Transcript of Jury Trial, Vol. VII, p. 130, September 21, 1994 (Testimony of Linda Duvall, surviving passenger).

* * *

Q. Did you reach an opinion as to whether this crossing, on and before January 11, 1991, was an extra-hazardous crossing?

A. I certainly did.

Q. And what is that opinion?

A. It was extra hazardous. It was – I'm not sure there's superlatives – it was extremely hazardous. Unbelievably hazardous.

Transcript of Jury Trial, Vol. VI, p. 64, September 19, 1994 (Testimony of Prof. C. J. Halley, expert witness).

* * *

APPENDIX II

IN THE COURT OF APPEALS, DIVISION 4

STATE OF OKLAHOMA

JAMES M. JOHNSON and FRANCES L. JOHNSON, as Representatives of the Estate of Jeremy Michael Johnson, deceased, Appellees, vs. MISSOURI PACIFIC RAILROAD COMPANY d/b/a UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, Appellant.	)	No. 84,527 NOT FOR PUBLICATION (Filed Jul. 16, 1996)

APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY, OKLAHOMA

Honorable James E. Edmondson, Trial Judge

Bill Settle
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MEMORANDUM OPINION

REIF, J.

Missouri Pacific Railroad Company appeals the judgment entered against it in favor of the parents of Jeremy Johnson in this wrongful death lawsuit. Jeremy had been the driver of a pickup truck which was struck by a train at an unprotected crossing in Fort Gibson. After hearing the evidence, the trial court made a special finding that Parents had proven by clear and convincing evidence that Railroad's conduct evidenced a wanton or reckless disregard for the rights of another, oppression, fraud or malice so as to allow the jury to return a verdict for punitive damages in excess of the actual damages awarded. While the jury found Jeremy and Railroad to be equally at fault, it found Railroad to be guilty of wanton, reckless, or intentional conduct and awarded punitive damages in excess of the actual damages.

Railroad's allegations of error on appeal can be categorized into errors concerning the admission of evidence and the conduct of the trial, and errors in the jury instructions. When addressing error in the admission of evidence and the conduct of the trial, the determinative issue is whether the trial judge abused his discretion in making his rulings and whether that abuse materially affected the substantial rights of the complaining party. *Lee v. Volkswagen of American, Inc.*, 688 P.2d 1283, 1290 (Okla. 1984); *see also Middlebrook v. Imler, Tenny & Kugler M.D.'s, Inc.*, 713 P.2d 572 (Okla. 1985).

Without addressing each of the individual items of error alleged by Railroad, we would note that we have scrutinized the record on appeal and with the exception

of the "speed issues," we find this case to have been well and fairly tried by both counsel and the trial court. We find no error in the trial court's rulings on the admissibility of evidence, the conduct of the trial itself, or the submission of the punitive damages claim.

The "speed issues" concern the application of a federal statute found in the Federal Railroad Safety Act, formerly 45 U.S.C. §§ 421-447 (1986), now recodified at 49 U.S.C. §§ 20101-26102 (1994). The pertinent part states:

> § 20106. National uniformity of regulation
>
> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order –
>
> (1) is necessary to eliminate or reduce an essentially local safety hazard;
>
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

Pursuant to this statute, the Secretary of Transportation promulgated regulations setting the *maximum* allowable operating speeds for trains according to the class or type of track upon which they operate. This statute has been

interpreted by the United States Supreme Court in *CSX Transportation v. Easterwood*, 507 U.S. 658 (1993). The court held that "federal regulations adopted by the Secretary of Transportation pre-empt [a plaintiff's] negligence action only insofar as it asserts that [a defendant's] train was traveling at an excessive speed." *Id.* at 676. Our inquiry must then focus on whether the trial court's admission of evidence concerning the train's speed, Fort Gibson's train speed ordinance, and the alleged agreement by Railroad to abide by a lower speed limit was erroneous. Also involved in this inquiry is the trial court's instructions touching upon the speed issues. While it is apparent that Parents assert that the train was traveling at an excessive speed, their claim is not solely one for negligence due to excessive speed. Railroad had a duty to operate the train safely, with due regard for the locale and other conditions. Evidence of the train's actual speed, Railroad's policies concerning speed, Railroad's knowledge of the conditions at the Fort Gibson crossings including previous near misses, and evidence of Railroad's prior involvement and "agreement" with the city of Fort Gibson concerning train speed limits all are admissible to prove elements of negligence other than just negligence due to excessive speed. We find no error in the admission of evidence concerning the "speed issues."

Railroad's predominant allegation of error on appeal is that based upon federal preemption of speed regulation the trial court erred when it instructed the jury that failure of Railroad to comply with the Fort Gibson train speed limit ordinance would be negligence per se. Because we are constrained by stare decisis to follow the

supreme court's interpretation that the federal regulations preempt an action based on excessive speed alone, we must determine whether the giving of this instruction, while perhaps erroneous, was prejudicial to Railroad in such a way that the jury would not have returned the verdict it did but for the erroneous instruction. *Oklahoma Ry. Co. v. Wilson*, 231 P.2d 688 (Okla. 1951). When we consider that the jury found Jeremy to be equally negligent with Railroad for the collision, we cannot say that the negligence per se instruction impacted Railroad in a manifestly prejudical way. This is bolstered by the additional finding by both the trial court and the jury that Railroad was more than just grossly negligent. Both found the conduct of Railroad to be wanton, oppressive, malicious, reckless to the point of disregard for the rights of others, or, perhaps, even intentional as it concerned the operation of the train through Fort Gibson at the time of the collision with Jeremy. We are persuaded that the jury heard the evidence, understood the actions and obligations of the parties, and returned a verdict which reflected their judgment. We do not believe that the negligence per se instruction was so prejudicial in light of the rest of the instructions as to require reversal of the verdict. We also find that the trial court's entry of judgment on the verdict to be proper.

AFFIRMED.

TAYLOR, P.J., and RAPP, C.J., concur.

July 16, 1996

(4)

Supreme Court U.S.
FILED
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No. 96-1103

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

MISSOURI PACIFIC RAILROAD COMPANY d/b/a UNION PACIFIC RAILROAD COMPANY
a Delaware Corporation

Petitioner,

v.

JAMES M. JOHNSON and FRANCIS L. JOHNSON, as Representatives of the ESTATE OF JEREMY MICHAEL JOHNSON, Deceased,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

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PETITIONER'S REPLY BRIEF

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Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

REPLY BRIEF FOR PETITIONER

Petitioner, Missouri Pacific Railroad Company, d/b/a Union Pacific Railroad Company ("Missouri Pacific") submits this Reply Brief to the Respondents' Brief in Opposition to the Petition for Writ of Certiorari, which seeks review of an order of the Supreme

Court of the State of Oklahoma, denying review of an opinion of the Court of Appeals of the State of Oklahoma.

REPLY TO RESPONDENTS' STATEMENT OF FACTS

Respondents have included in their Statement of the Case numerous misstatements of fact. Missouri Pacific will summarize the most significant inaccuracies.

1. ***The Performance of the Train Whistle.*** Respondents' statement that "[t]hey never heard a whistle" is inaccurate in that the it infers that the train whistle was not blown by the train crew, or if blown, was not heard by Jeremy Johnson. Six Fort Gibson city residents testified that they heard the train whistle at the time of this collision.

2. ***The Alleged Agreement Between the Railroad and City of Fort Gibson.*** Respondents' statement that the Railroad and the City entered into an agreement concerning train speed and crossing improvements is inaccurate. The City's ordinance restricting train speed through Fort Gibson to 20 mph was passed in 1972, but raised to 40 mph, after discussions with unidentified attorneys allegedly representing the Railroad. The minutes indicate that "the Board voted to raise the speed limit and the Railroad will *investigate the possibility* of correcting some blind corners at crossings". In fact, the Railroad did substantially improve this crossing after a 1972 accident.

3. ***The Crossing and Corridor Project.*** Respondents' statements concerning the extrahazardous nature of the crossing is inaccurate. Prior to Jeremy Johnson's accident, there had been only one known automobile/train accident in the city which happened at this crossing in 1972. The Manager of Rail-Highway Safety for the Oklahoma Department of Transportation testified that the crossing was not high on the Department's priority index. None of the Fort Gibson crossings would have qualified for improvements under the Department's priority list. Fort Gibson was selected for a corridor project because the city had several crossings within a short track distance, some of which could be consolidated and eliminated. The Railroad had no reason to believe that this crossing was more hazardous than any other crossing in the city, and no one from the Railroad testified to the contrary.

4. ***Respondents' Allegation that the Railroad Delayed Safety Improvements at the Crossing.*** Respondents' statement that the Railroad delayed improvements at the crossing is inaccurate. If not for the Corridor Project, as requested by the Railroad, the Department of Transportation would not have improved this crossing. The Department of Transportation discourages independent action by railroads. Even if a railroad acted independently, it still would have to proceed through the normal regulatory process to gain agency approval before upgrading a crossing.

The facts listed in Respondents' Statement of the Case are not relevant and only serve as a distraction to the issue presented by Missouri Pacific. The issue remains one of federal law. The question presented is: *Does the Federal Railroad Safety Act preempt*

all municipal ordinances which purport to govern the speed of trains through towns and cities in the United States?

RESPONDENTS PRESENT NO VALID REASON FOR EXEMPTING A MUNICIPALITY FROM THE FEDERAL RAILROAD SAFETY ACT.

Summary of Argument

The arguments of the Respondents do not refute the legal arguments or authority presented to this Court in Missouri Pacific's main brief. Respondents only present arguments designed to circumvent the issue of federal preemption. Contrary to Respondents' position, there are several compelling reasons for this Court to review the opinion of the Oklahoma Court of Appeals. The Oklahoma opinion will create a conflict between federal and state law on a substantial issue of federal law. The Oklahoma opinion will unreasonably burden interstate commerce by allowing towns and cities in Oklahoma to regulate train speed on interstate trains. Separate municipal regulations of speed would undermine safety, and as such, merits the determination of this Court.

I. THERE ARE COMPELLING REASONS TO REVIEW THE UNPUBLISHED OPINION OF THE OKLAHOMA COURT OF APPEALS.

The Oklahoma opinion will have an "persuasive effect" creating a conflict between federal and state law. The United States Supreme Court has held that judgments of intermediate appellate courts were judgments of the highest court of the state, under the

provisions of 28 U.S.C. § 1257, where discretionary review of the judgments of the intermediate appellate courts had been denied by the highest court of the state. *American Ry. Express Co. v. Levee*, 263 U.S. 19 (1923); *Bacon v. Texas*, 163 U.S. 207 (1896). Unpublished opinions may be cited for the persuasiveness of their reasoning. *Hupman v. Cook*, 640 F.2d 497 (Va. 1981); *Taco Bell v. City of Mission*, 678 P.2d 133 (Kan. 1984). An unpublished opinion may be cited for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case. *Time, D.C. Freight Lines v. Industrial Com'n of Arizona*, 713 P.2d 318 (Ariz. Ct. App. 1985); *Smith v. Warbasse*, 526 A.2d 991 (Md. Ct. Spec. App. 1987). In Oklahoma, unpublished opinions are frequently attached to a brief in an effort to provide a court with as much information as possible on the issues in controversy.

Federal Courts have held that if counsel believes that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such decision may be cited if counsel serves a copy thereof on all other parties in the case and on the court. *Baer v. R & F Coal Co.*, 782 F.2d 600 (6th Cir. 1986). State courts have also held that prior unreported cases of an appellate court may be cited by such court and may be relied upon as authority and precedent by the trial court and by counsel. *State v. George*, 362 N.E.2d 1223 (Ohio Ct. App. 1975).

Respondents fail to mention that the Oklahoma decision can be cited for its persuasive effect and precedential value in relation to a material issue in a case. A cursory review of cases cited in

Oklahoma opinions shows that unpublished opinions are often cited for their persuasive or precedential effect.

Respondents' most blatant misstatement is their argument that the Oklahoma decision follows *Easterwood*. *CSX Transportation v. Easterwood*, 507 U.S. 658 (1993). The Oklahoma Decision did not correctly cite, apply, or follow *Easterwood*. It is difficult to understand how the Respondents could argue that a court which not only allows the introduction of evidence regarding excessive train speed and a municipal ordinance restricting train speed, but also allows the submission of negligence *per se* and punitive damage instructions regarding the municipal ordinance and train speed correctly applied *Easterwood*. The federal rule is that municipalities cannot be exempt from the provisions of the FRSA.

II. OKLAHOMA HAS NOT ADOPTED ANY LAW WHICH WOULD DEFEAT PREEMPTION.

Congress expressly intended that the Federal Railroad Safety Act (the "FRSA"), formerly 45 U.S.C. §§ 421-447 (1986), now recodified at 49 U.S.C. §§ 20101-26102 (1994), preempt all railroad safety legislation except *state law* governing an area in which the Secretary of Transportation has not issued a regulation or order or *state law* more strict than federal regulations when necessary to address *unique* local problems. 49 U.S.C. § 20106. Respondents have totally mischaracterized the Railroad's discussion of the preemptive effect of the FRSA. The Railroad agrees that the FRSA allows a state law to continue in force ***if*** the requirements of 49 U.S.C. § 20106 are met. A *state* may adopt or continue in force an additional or more stringent law, regulation or order related to

railroad safety *so long as* the law, regulation or order: (1) is necessary to eliminate or reduce essentially locally safety hazards; (2) is not incompatible with a law, regulation, or order of the United States government; and (3) does not unreasonably burden interstate commerce. 49 U.S.C. § 20106. These exceptions apply only to a "*State*". Only when a state law meets all three requirements set forth in § 20106 does preemption not occur. *See Wright v. Illinois Central R..R Co.*, 868 F. Supp. 183 (S.D.Miss. 1994); *Smith v. Norfolk & Ry. Co.*, 776 F. Supp. 1335 (N.D.Ind. 1991).

The State of Oklahoma ***has not*** adopted a more stringent law, regulation or order in this case, and therefore, the exceptions allowed under 49 U.S.C. § 20106 need not be addressed.

A. State Delegation of FRSA Authority to Municipalities is Impermissible.

Respondents argue that the State of Oklahoma has delegated its authority to regulate train speed to municipalities. Since Congress did not intend for municipalities to have such power, the State of Oklahoma cannot confer that power by delegation. Otherwise, all fifty (50) states could frustrate Congress's intent to provide for a national, uniform system of railroad regulation through the mechanism of delegation. The allowance of control of train speed by thousands of separate local municipalities would annihilate the clearly-stated Congressional intent. H.R.Rep.No.1194, 91st Cong., 2d Sess. 11, 19 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109.

The statute relied on by the Respondents, Okla. Stat. Ann. Tit. 11, § 22-119 (1991), was first enacted in 1890, eighty (80) years

prior to the enactment of the FRSA. The 1890 version of the statute provides in pertinent part, as follows:

> The council shall have power... to regulate the running of railway engines, cars and trucks within the limits of said city, and to prescribe rules relating thereto, and to govern the speed thereof....

Okla. Stat. ch. 15, § 36 (1890). The current version of this statue is virtually unchanged and makes no reference to the FRSA. The limitations on state regulation provided in the FRSA are not contained in the delegation statute. Clearly, the Oklahoma Legislature did not contemplate at any time that the State's regulatory authority under the FRSA was being transferred to municipalities by was of this statute, and no court has interpreted the statute so.

Congressional intent determines whether federal law preempts a particular state or local law. Even if Congress has not expressly displaced state law in a given subject area, state law will be adjudicated preempted if it stands in "actual conflict" with federal law. *California Coastal Common v. Granite Rock Co.*, 480 U.S. 572 (1987). A federal statute that expressly calls for preemption of matters "relating to" the subject matter of that statute preempts "actions having a connection with or reference to" that subject matter. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

> Congress did not intend to permit states to exercise their authority under section 434 by delegating it to

> municipalities. Such a reading is completely at odds with the language of section 434, the structure of the FRSA as a whole, and Congressional purpose in adopting the statute.

City of Covington v. Chesapeake & Ohio Ry., 708 F. Supp. 806, 808 (E.D.Ky. 1989).

Even if the City of Fort Gibson's ordinance had been promulgated under the express state constitutional authority (which is was not), it still would be preempted by the provisions of the FRSA. *CSX Transp., Inc. v. City of Thorsby*, 741 F. Supp. 889, 891 (M.D.Ala. 1990); *CSX Transp., Inc. v. City of Tullahoma*, 705 F. Supp. 385, 387-388 (E.D.Tenn. 1988); *Southern Pacific Transp. Co.,v. City of Baldwin*, 685 F. Supp. 601, 604 (W.D.La. 1987); and *CSX Transp., Inc. v. City of Plymouth*, 86 F.3d 626, 629-630 (6th Cir. 1996) (dealing with a crossing blocking ordinance). Federal courts have also uniformly held that any *state* statute which purports to delegate power to the cities to regulate train speed is unconstitutional by virtue of the Supremacy Clause. *Chesapeake & Ohio Ry. Co. v. City of Bridgman*, 669 F. Supp. 823, 825 (W.D.Mich. 1987); *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228, 1230 (N.D.Ind. 1987).

The type of delegating statute on which the Respondents rely has been held unenforceable, void, and preempted under the FRSA by every court that has addressed the issue.

The Respondents contend that municipalities can regulate train speed under the FRSA. They do not base this contention on any

court decision which has directly addressed the issue. The Respondents have attempted to distract this Court from the essential issue before this Court - Does the FRSA govern the speed of a train through a city, and, therefore preempt all municipal ordinances and resulting claims based on excessive speed?

CONCLUSION

The Oklahoma Courts' decision is in conflict with the provisions of the FRSA and this Court's decision in *Easterwood*, as well as every other federal court decision which addresses the authority of municipalities to regulate train speed. For the foregoing reasons, Missouri Pacific respectfully requests the Petition for Writ of Certiori be granted.

Respectfully submitted,

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